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No. 10-85

In the Supreme Court of the United States

BARRY SCHEUR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court's accommodations for petitioner's blindness were constitutionally deficient.

2. Whether the prosecutor's comments during rebuttal argument constituted reversible error.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-48) is reported at 600 F.3d 434.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 2010. A petition for rehearing was denied on April 12, 2010 (Pet. App. 49-50). The petition for a writ of certiorari was filed on July 1, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioner was convicted in the United States District Court for the Eastern District of Louisiana of conspiring to commit mail and wire fraud, in violation of 18 U.S.C. 371; three substantive counts of mail fraud, in violation of 18 U.S.C. 1341; and four sub-

stantive counts of wire fraud, in violation of 18 U.S.C. 1343. He was sentenced to 20 months of imprisonment, to be followed by two years of supervised release. Pet. C.A. R.E. Tab 5, at 1-3. The court of appeals affirmed. Pet. App. 1-48.

1. Petitioner is the former owner, president, and chief executive officer of The Oath for Louisiana, a Louisiana health maintenance organization. State law requires all such organizations to maintain a net worth of at least $3 million as a cushion for claims and to file detailed quarterly and annual financial reports with the state insurance department. Beginning in the third quarter of 2000, petitioner and his co-defendant Robert McMillan, another company officer, caused to be filed false financial reports that included speculative, nonexistent, and misreported assets in order to make it appear that The Oath met the statutory net-worth requirement. This scheme enabled them to keep the company running without regulatory interference, which in turn allowed the company to continue to collect premiums from insureds and to pay hundreds of thousands of dollars in monthly management fees to petitioner's consulting firm. Pet. App. 2-6.

The state insurance department began to discover The Oath's true financial condition towards the end of 2001. By the time it placed the company in receivership in April 2002, the company's liabilities, much of which consisted of debt to medical services providers, exceeded the company's assets by over $40 million. Petitioner's consulting firm had received roughly $6.1 million in fees from the company. Pet. App. 6.

2. A federal grand jury in the Eastern District of Louisiana returned a 14-count indictment against petitioner, McMillan, and two other defendants (one of

whom later pleaded guilty), charging conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. 371; five counts of substantive mail fraud, in violation of 18 U.S.C. 1341; and eight counts of substantive wire fraud, in violation of 18 U.S.C. 1343. Pet. C.A. R.E. Tab 3A 1-16.

3. a. Just over a month before trial, the government informed the district court that petitioner is blind. In a subsequent pretrial status conference, the court attempted to ascertain what accommodations petitioner might need during trial. Petitioner's counsel refused to provide any information, claiming that any statements might infringe on petitioner's Fifth Amendment rights. Pet. C.A. R.E. Tab 8, at 4 & n.5 (4/24/2008 Order); *id.* at 5 n.6.

The government then filed a motion in limine regarding potential issues that could arise at trial due to petitioner's blindness. 07-169 Docket entry No. 130 (E.D. La. filed Apr. 1, 2008). In response, petitioner stated that he "will be able to follow the oral testimony at the trial" and that "[d]ue process will be satisfied by the government providing [him] with certified Braille translations of the exhibits it intends to use, sufficiently in advance of trial to allow him to review them." 07-169 Docket entry No. 150, at 2 (filed Apr. 9, 2008). Less than two weeks before trial was scheduled to begin, however, petitioner moved for an expedited competency hearing under 18 U.S.C. 4241, "arguing that his disability prevented him from understanding the nature and consequences of the proceedings against him and from assisting properly in his defense." 07-169 Docket entry No. 184 (filed Apr. 16, 2008); 4/24/2008 Order 5.

After additional briefing and an expedited hearing, at which petitioner and an expert testified, the district

court issued a written order finding petitioner competent to stand trial. 4/24/2008 Order 7-10. The district court determined that petitioner has two primary methods to absorb written information—reading Braille and listening—and that both methods can be used to meaningfully convey the contents of financial documents. *Id.* at 8-10. Many of the documents at issue were from petitioner's own company, and petitioner "testified that he relies heavily on other people to synthesize and present information to him in a summary fashion." *Id.* at 10. The court concluded: "In sum, having dealt with the reality of not being able to see financial documents his entire professional career, but nevertheless having engaged in, and become an expert (according to his own web site) in, advising and running healthcare companies, [petitioner] simply cannot come to this Court on the eve of trial purporting to be incompetent on this ground." *Ibid.*

The district court also explained the accommodations it intended to provide petitioner at trial. 4/24/2008 Order 11-15. It permitted petitioner to use his hand-held Braille computer at all times during the trial, allowed him to use Braille translations of exhibits if he testified (provided that such translations were produced to the government at least three days before his testimony), and required the government to turn over at least three days in advance any Braille documents intended for use in cross-examining him. *Id.* at 14. The district court did not, however, require the government to provide Braille translations of all of its proposed exhibits. *Ibid.* The district court observed that the government had produced its proposed exhibits over three weeks before trial and that petitioner had access to many of them years before that, either because they were part of his com-

pany's files or because they were at issue in related litigation. *Ibid.* It further observed that petitioner had failed to take advantage of the opportunity to review the exhibits using methods he had used throughout his career, instead choosing to "come to this Court seeking to be declared incompetent or, alternatively, to force the government to reproduce these documents manually in an alternate form." *Id.* at 10, 15. Under the circumstances, the district court concluded, petitioner had "already been provided a reasonable opportunity to obtain the benefit of his constitutional rights" to assist in his own defense and confront the witnesses against him, and did not require further accommodation. *Id.* at 15 (internal quotation marks and citation omitted).

Three days before trial, petitioner moved for a continuance because the government had updated its exhibit disclosure within the preceding four days, as the district court's scheduling order required it to do. See 07-169 Docket entry No. 64, at 2 (filed Nov. 30, 2007); 07-169 Docket entry No. 228 (filed Apr. 25, 2008). The government responded that many of the added exhibits, including the lengthiest ones, were documents from The Oath's own files. 07-169 Docket entry No. 234, at 2 (filed Apr. 25, 2008); Gov't C.A. Br. 66. The district court denied the continuance motion without comment. Pet. C.A. R.E. Tab 9.

On the second day of trial, petitioner moved for a mistrial on the ground that he could not adequately follow, comment on, and assist his counsel in analyzing the evidence. The district court, reiterating the reasoning set forth in its prior order, denied the motion. 4/29/2008 Afternoon Tr. 37-38, 73-74.

b. Neither petitioner nor his co-defendants testified at trial. Pet. App. 29. In closing arguments, their sepa-

rate counsel all sought to deflect blame to various other actors. 5/7/2008 Tr. 32-52, 62-66, 70-74; Gov't C.A. Br. 74-75. The prosecutor responded in rebuttal argument by telling the jury:

> Ladies and gentlemen, over the past hour and 45 minutes you've heard a lot of outrage, a lot of outrage by the defendants in this case. * * * What you've seen from the defense here is attack, blame the Department of Insurance, blame [a particular state regulator], blame the accountants, blame the lawyers, blame the government. Not one of these defendants is stepping up and saying that they did anything wrong.

5/7/2008 Tr. 77.

The defense objected and moved for a mistrial. 5/7/2008 Tr. 77-78. The district court denied the motion, but immediately delivered a curative instruction:

> I specifically instructed you before that no defendant need testify, they need put on no evidence, they need not put on anything at all. It is always the government's burden to prove every essential element and the defendant need to prove nothing. So you're to disregard that last comment. The defendant need not say anything, so disregard that and we'll continue with the argument.

Id. at 78-79. The defendants did not seek an additional, or different, curative instruction. See *ibid.*

Resuming his argument, the prosecutor explained to the jury:

> Ladies and gentlemen, I misspoke. What I meant to say was * * * is that there is blame being played at the face of everybody in this courtroom but there's

> no responsibility at all being taken on behalf of the defendants. Okay. That's what was meant to be said here.
>
> The defense counsel, not the defendants, the defense counsel stepped up to this podium and blamed everybody in this courtroom. But not once did they explain to you, did they take responsibility for the actual items, the schemes in this case.

5/7/2008 Tr. 79. No defendant objected to this explanatory statement. See *ibid.*; Gov't C.A. Br. 76.

Before the case went to the jury, the defendants renewed their motion for a mistrial, contending that the prosecutor had "turned and very aggressively gestured toward the defendants as he made a statement that clearly, irrespective of what his intent was, conveyed a message to the jury that there was something to hide by the fact that the defendants didn't take the stand." 5/7/2008 Tr. 93.[1] They did not mention the prosecutor's second, explanatory statement, nor did they object to the district court's curative instruction. *Ibid.* The district court denied the renewed motion. *Ibid.*

In its final instructions, the district court informed the jury that "[t]he law does not require a defendant to prove his or her innocence or to produce any evidence at all. In fact, a defendant has a constitutional right not to testify; and if the defendant chooses not to testify, no

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[1] Other than this statement by defense counsel, which the district court neither agreed with nor acknowledged, the record contains no support for petitioner's assertion—which the government disputes, see Gov't C.A. Br. 75 n.21—that the prosecutor "turned toward the three defendants, raised his voice," and "gestured at them" while making the remark at issue. Pet. 6.

inferences whatever may be drawn from the election of the defendant not to testify." 5/8/2008 Tr. 4.

c. The jury found petitioner guilty on the conspiracy count, three of the mail fraud counts, and four of the wire fraud counts. Pet. App. 8. The district court, citing its previous rulings on the issue, denied a post-trial motion for acquittal or a new trial in which petitioner argued that his due process rights were violated because he did not receive reasonable accommodations for his blindness. Pet. C.A. R.E. Tab 11, at 2-4, 9-10.

The Sentencing Guidelines range for petitioner's sentence was 97 to 121 months of imprisonment. The district court, however, sentenced petitioner to 20 months of imprisonment, to be followed by two years of supervised release. Pet. App. 44; Pet. C.A. R.E. Tab 3A 2 3.

3. The court of appeals affirmed. Pet. App. 1-48. It held that the district court had not violated petitioner's due process rights by failing to provide reasonable accommodations for his blindness. See *id.* at 32-37. As to petitioner's argument that the district court should have required the government to provide Braille copies of all of its exhibits, the court of appeals observed that even though the "prosecution had been ongoing for nearly three years," petitioner "did not raise an issue about his inability to comprehend exhibits until the eve of trial"; that petitioner had access to most of the exhibits at least three weeks before trial; that many of the exhibits came from The Oath's own files or were the subject of long-running related litigation, so petitioner should have been familiar with them; that petitioner had frequently encountered documents of similar complexity in his professional life and had relied on others to present oral summaries; and that petitioner could hear testimony about the exhibits and assist his attorney during trial. *Id.* at

34-35. As to petitioner's argument that the district court should have granted a continuance when the government produced additional exhibits shortly before trial, the court of appeals found no abuse of discretion, observing that the government produced the material in timely fashion; that petitioner had known the material was coming but never asked ahead of time that it be produced earlier or that Braille translations be provided; that some of the material came from the Oath's own files; and that petitioner could not identify any "exhibit or statement that caused a disadvantage to his defense because the Government did not produce it sooner." *Id.* at 36-37. The court of appeals concluded that, under the circumstances, petitioner "had a fair opportunity to defend his case," *id.* at 37, and "was not subject to a fundamentally unfair trial," *id.* at 34.

The court of appeals also held that the prosecutor's statements during rebuttal argument did not constitute reversible error. See Pet. App. 29-32. Even "assum[ing] that the prosecutor's comments improperly reflected on the defendants' failure to testify," the court of appeals determined that, "[i]n context, * * * the comments were more an isolated remark than a call for the jury to focus on the fact that the defendants did not testify." *Id.* at 31. The court of appeals additionally observed that the district court gave an "immediate curative instruction" and twice—once at the close of the government's case and once in the full jury charge—instructed the jury not to draw any inferences from a defendant's exercise of his right not to testify. *Ibid.* "That the jury heeded these instructions and was not inflamed by the prosecutor's comments," the court of appeals said, "is supported by the verdicts finding [petitioner] and McMillan guilty on some charges but not on others, and

by its full acquittal of another defendant." *Id.* at 31-32. In sum, the court of appeals saw no "error causing a clear effect on the jury" and concluded "that the prosecutor's comments failed to rise above the level of harmless error." *Id.* at 32.[2]

ARGUMENT

Petitioner renews (Pet. 9-25) his claims that he was denied constitutionally required accommodations for his blindness and that the government impermissibly commented on his decision not to testify. The court of appeals correctly rejected both claims. Its decision does not conflict with any decision of this Court or of another court of appeals, and further review is unwarranted.

1. Petitioner contends (Pet. 9-17) that his constitutional rights were violated because the accommodations provided by the district court for his blindness were inadequate. That fact-bound contention lacks merit.

The court of appeals recognized that "reasonable accommodations ought to be made to ensure that a defendant facing trial can comprehend the proceedings against him." Pet. App. 33. It furthermore recognized that a failure to provide sufficient accommodations might amount to a denial of due process. *Id.* at 33-34 & n.61. But it determined that in the particular circumstances of this case, petitioner "was not subject to a fundamentally unfair trial." *Id.* at 34.

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[2] The court of appeals also rejected petitioner's and McMillan's claims that the indictment was untimely, that the indictment and evidence were insufficient, that the indictment was constructively amended, and that the district court erroneously allowed lay witnesses to present expert opinion testimony. See Pet. App. 9-28, 38-42. Petitioner does not renew those claims in this Court. McMillan has filed a separate petition for a writ of certiorari (No. 10-5263), which petitioner has not joined.

Those circumstances, as observed by the court of appeals and the district court, included the following: It was the government, not petitioner, that first brought petitioner's disability to the district court's attention. 4/24/2008 Order 4 & n.5. Petitioner waited until the "eve of trial," nearly three years after the original indictment, to raise the accommodation issue with the district court. Pet. App. 34; cf. *Yakus* v. *United States*, 321 U.S. 414, 444 (1944) ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right."). Petitioner and his counsel had access to most of the exhibits at least three weeks before trial, and did not make good use of that time. Pet. App. 34; 4/24/2008 Order 15. Petitioner in fact had access to many of the documents long before that, as they either were from his company's own files or had been the subject of related litigation. Pet. App. 34; 4/28/2008 Order 14. Petitioner knew ahead of time that a supplemental production would arrive less than a week before trial,[3] yet never sought any accommodation before that production was made. Pet. App. 36. Petitioner, who in his professional life "relied heavily on other people to synthesize and present information to

[3] The court of appeals noted that the government asserted at oral argument that the new exhibits, which included Jencks Act material, were produced in accord with the local rules. Pet. App. 36; 18 U.S.C. 3500. Petitioner argues that "*there is no local rule* on the topic." Pet.16 (emphasis in original). In fact, at oral argument the government stated that the exhibits were produced in accord with common practice in the district, as well as an agreement between the parties. Oral argument recording: *United States* v. *McMillan*, No. 08-31148, at 38:30 to 39:00 (Feb. 1, 2010), http://www.ca5.uscourts.gov/OralArgumentRecordings/08/08_31148_2-1-10.wma. The court of appeals' reference to a "local rule" rather than "local practice" did not affect its ultimate conclusion.

him in summary fashion," could hear the oral testimony presented about the exhibits at trial. *Id.* at 35. Petitioner could highlight to no specific instances in which the admission of an exhibit without a Braille translation, or the late production of an exhibit, prejudiced his defense. *Id.* at 35-36; see Pet. 9-17.

The court of appeals did not err in concluding that petitioner "had a fair opportunity to defend his case" and "an adequate opportunity to participate in his own defense." Pet. App. 37 & n.68. Petitioner does not identify a conflict between that determination and any decisions of this Court or the other courts of appeals. His claim accordingly warrants no further review.

2. Petitioner also renews (Pet. 18-25) his argument that the prosecutor's remark in rebuttal argument that "[n]ot one of these defendants is stepping up and saying that they did anything wrong" constituted reversible error. The court of appeals correctly rejected that argument, and there is no reason for this Court to review that fact-bound decision.

Petitioner first asserts (Pet. 18-19) that the courts of appeals are not applying this Court's decision in *Griffin* v. *California*, 380 U.S. 609 (1965), uniformly. According to petitioner, "the line between what constitutes an impermissible comment" on a defendant's silence "and what does not is unintelligible." Pet. 19. But even assuming that were so, it would have no bearing on this case. The court of appeals concluded that there was no reversible error "*even if* [*it*] *assume*[*d*] that the prosecutor's comments"—which, the prosecutor clarified, were intended to refer only to defendants' counsel—"improperly reflected on the defendants' failure to testify." Pet. App. 31 (emphasis added).

Petitioner additionally asserts (Pet. 22-23) that the district court's curative instruction was inadequate because it did not expressly tell the jury not to draw any negative inferences from the defendants' silence. Petitioner, however, never requested a different curative instruction. 5/7/2008 Tr. 79, 93. Furthermore, as the court of appeals observed, the district court twice instructed the jury—once before closing arguments and once after—not to read anything into the defendants' exercise of their Fifth Amendment rights. Pet. App. 31; cf. *Kentucky* v. *Whorton*, 441 U.S. 786, 789 (1979) (per curiam) (claim of constitutional error arising from failure to give instruction "must be evaluated in light of the totality of the circumstances—including all the instructions to the jury"). Petitioner's claim (Pet. 22-23) that the court of appeals' reasoning on this issue conflicts with a different decision of the same court, *United States* v. *Griffith*, 118 F.3d 318 (5th Cir. 1997), does not merit review. Not only would any intra-circuit conflict be for the court of appeals, not this Court, to resolve, see *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam), no conflict exists. In *Griffith*, unlike this case, the jury was *never* instructed that a defendant has a constitutional right not to testify and that no adverse inference should be drawn from his exercise of that right. Compare 118 F.3d at 325, with Pet. App. 31.

Petitioner finally asserts that the court of appeals improperly "used" the jury's split verdict "as a way to find harmless error." Pet. 21. The split verdict, however, was a subsidiary factor in the court of appeals' harmless-error analysis. The court of appeals noted that the split verdict "supported" its conclusion that "the jury heeded the[] instructions and was not inflamed by the prosecutor's comments." Pet. App. 31. But it had

reached that conclusion through a consideration of other factors—namely, that the prosecutor's "comments were more an isolated remark than a call for the jury to focus on the fact that defendants did not testify," that the district court gave an immediate curative instruction, and that the jury was twice instructed not to draw adverse inferences from a defendant's silence. *Ibid.*; see *Zafiro* v. *United States*, 506 U.S. 534, 540 (1993) ("[J]uries are presumed to follow their instructions.") (citation omitted).

Petitioner cites a handful of cases in which courts have concluded, in different factual circumstances, that a split verdict corroborated a determination of prejudice by suggesting that a case was close. See Pet. 21-22, 24 (citing *United States* v. *Van Eyl*, 468 F.3d 428 (7th Cir. 2006); *United States* v. *Simtob*, 901 F.2d 799 (9th Cir. 1990); *United States* v. *Burse*, 531 F.2d 1151 (2d Cir. 1976)); see also *United States* v. *Kallin*, 50 F.3d 689, 695 (9th Cir. 1995) (split verdict was "ambiguous") (cited at Pet. 20-21, 24); McMillan Br. 7-8, 10. But in those cases, like this one, the split verdict was one factor among many; and in those cases, *unlike* this one, the additional factors weighed against a determination of harmlessness. See *Van Eyl*, 468 F.3d at 438 (error was "powerful and persuasive" and substance of government's evidence was weak) (citation omitted); *Simtob*, 901 F.2d at 806 (error had "extraordinary dramatic and inferential power" and attempted curative instruction was insufficient); *Burse*, 531 F.2d at 1155 (error included numerous impermissible statements during closing argument and substance of government's evidence was weak). Context-dependent variations in the significance assigned to a single factor of the harmless-error analysis, which in each case involves the "case-specific application

of judgment, based upon examination of the record," do not warrant this Court's review. *Shinseki* v. *Sanders*, 129 S. Ct. 1696, 1705 (2009) (citing *Kotteakos* v. *United States*, 328 U.S. 750, 760 (1946)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2010